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## **DRAFT – Forthcoming in The Constitutional Dimension of Contract Law, Springer, 2017**

### **Reflections on the *Pactum* in the Public and Private Spheres**

**Luca Siliquini-Cinelli\***

#### **Abstract**

This chapter delves into the nature of the *pactum* as both substantial and functional bond as well as mythical canon of any contractual-constituting initiative in the public and private spheres. The aim is to show that the movement toward the conceptualisation of good faith as an organising principle and implied term in the Common law tradition is due to the need to counterbalance our inhuman condition as made it manifest by the humanitarian façade of the modern constitutional project. This claim is supported by an unconventional method of investigation that will promote the comparison between the role of political action at the public level and the increasing utilisation of the doctrine of good faith in Contract law theory and practice.

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This chapter is based on a paper presented at the Annual Conference of the UK Branch of the International Association for Philosophy of Law and Social Philosophy (IVR), held at the School of Law, Queen's University Belfast, on 23 October 2015. The theme of the conference was *Public/Private: Unlocking the Boundaries of Legal Thought*. I wish to thank all those who provided me with valuable suggestions. I am particularly grateful to Oscar Roos for constructive comments on an earlier draft. Errors are mine only.

## 1 Introduction

The idea to embark upon the editing of this book was born from the writing of a paper whose aim was to address the reasons and extent to which, within the area of specific performance, the development of the law of contract is currently influenced by constitutional values and Fundamental Rights issues in South Africa, the UK, and Australia.<sup>1</sup> On that occasion, particular attention was dedicated to analysis of how and why the common trend towards good faith and contractual fairness in these jurisdictions is characterised by a clear divergence of positivistic methodologies. In light of that study and its outcomes, other chapters deal with the interplay of Fundamental Rights and Constitutional/Contract law on a comparative basis to provide the reader with other compelling accounts of several core components of the contractarian dimension.

The appearance of the present contribution at the end of this collection of essays is due not only to its length, but also to its essence, which is far less positivistic and more philosophical<sup>2</sup> than that of the pieces that precede it. The intent is indeed to offer a general theoretical framework to contextualise further the constitutionalisation of Contract law from a broader perspective of inquiry. This will be done by addressing what the *pactum*, as both substantial and functional bond and mythical canon of any contractual-constituting initiative, is currently experiencing in the West at the private and public levels.

Supiot is of the opinion that the Westernisation of living standards is informed by the liberal ideology of ‘contractualism’, that is, by ‘the idea that the contractual bond is the ultimate form of social bond and is destined to replace the unilateral imperatives of the law everywhere’.<sup>3</sup> Rather than being something to favour, Supiot maintains that the West’s belief in contractualism ought to be challenged, as it drains the law’s anthropological function by ‘conceiv[ing] of society as a sum of individuals motivated by self-interested calculation’.<sup>4</sup> The reason for this is, Supiot notes, the instrumentalist role assumed by ‘the law of contract . . . [in] market operations’.<sup>5</sup>

Importantly, Supiot further distinguishes the ideology of contractualism from its material counterpart, which he defines as the ‘process of contractualisation’, and which is aimed at extending all those ‘contractual techniques’ that are in line with the liberal conception of societal relations and the West’s aspiration for global, systematic unity. The role that Supiot assigns to contractualism in the

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<sup>1</sup> Siliquini-Cinelli and Hutchison (2016).

<sup>2</sup> On the importance of having a philosophical approach to comparative law, see Ewald (1995). See also Samuel (1998).

<sup>3</sup> Supiot (2007), p. 83.

<sup>4</sup> Ibid., p. 84. See also Collins (1999), pp. 128–147.

<sup>5</sup> Supiot (2007), p. 85.

‘blurring of the distinction between public and private’<sup>6</sup> appears to be consistent with Cotterrell’s notion of ‘legal ideology of contract’. According to Cotterrell, the ideology of contract is indeed made up of two different elements: one referring to the humanising fiction perpetrated through contracts, the other to the pervasiveness of contractual relationships and the relevance of their repercussions for society at large. More specifically, with respect to the former component, Cotterrell specifies that ‘[t]he ideological significance of legal contract form lies in the idea of legal *equivalence*, the exact legal balancing of reciprocal rights and obligations of formally equal contracting parties assumed to be acting freely’.<sup>7</sup> However, Cotterrell notes, ‘[i]n this way the law systematically interprets actual relations and conditions of inequality and substantial unfreedom as relations of equality and free choice, and attaches legal consequences accordingly’.<sup>8</sup> The second element is, instead, that of universality in the sense that this ideology performs its instances in everyday life because it is capable ‘of being applied [also] to . . . relations not directly concerned with economic production.’<sup>9</sup> Through this double-featured structure and force, ‘[t]he pervasive legal ideology of contract . . . promotes the breakdown of all major status differentials unconnected with the needs of an economy based on market exchanges and confirms and defines the particular form of individualism in them of which capitalist social relations are conceptualised.’<sup>10</sup>

What is of significance for our purposes is that, once combined, Supiot’s and Cotterrell’s accounts of what contractualism and the contractualisation of human existence entail is in line with the well-known notion of *homo oeconomicus*, that is, of a subject who does not act freely in determining who she is as a person, but merely behaves according to reason-oriented inputs.<sup>11</sup> The paradigm of *homo oeconomicus* is in this sense the protagonist of a form of society underpinned by inter-subjectivity without subjects. This self-dissolving essence of *homo oeconomicus* is due to the fact that reason is common to all of us, and thus, as Kahn has pointed out, ‘is not self-defining’.<sup>12</sup> When we pursue our own *interest*, that is, when we let our attitude be determined by the outcome of a *rational* calculation (Heidegger would call it the ‘calculating self-adjustment of *ratio*’<sup>13</sup>), we do not *actively* decide for and against something or someone but merely dwell in what we should perhaps define as a procedural—as opposed to absolute—truth. Consequently, to speak of ‘rational action’ is nothing but an oxymoron: action is as never rational, nor predictable, as behaviour is. This explains why the civilising mission of contract<sup>14</sup> has played a pivotal role in the formation of our post-historical and post-political condition

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<sup>6</sup> Supiot (2007), p. 106.

<sup>7</sup> Cotterrell (2008), p. 175. (Emphasis in original).

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., p. 176.

<sup>10</sup> Ibid.

<sup>11</sup> My approach to *homo oeconomicus* is purely philosophical. Given how often the term ‘self-determination’ is used to describe this form of conduct, it is expected that some commentators would not share this view. See Schütte, in this book; Siliquini-Cinelli (2015a).

<sup>12</sup> Kahn (2008), p. 175.

<sup>13</sup> Heidegger (1998), p. 50.

<sup>14</sup> Supiot (2007), pp. 79–86.

by displacing the self-affirming properties of action. As such, it has also revealed the illusory character of modern social contract theory and the modern constitutional ideal as we are accustomed to consider them.

To understand this fully, attention should be paid to the opposed condition that the humanising (that is, self-defining, historical, and political) *deditio in fidem* expressed in and performed through the pact is assuming in the constitutional (public) and contract (private) spheres in Western jurisdictions. The need to conduct such an analysis is related to (1) the move of Western civilisation towards a global model of society underpinned by the notions of ‘civilised economy’ and ‘good economic governance’;<sup>15</sup> (2) the increased reference to the doctrine of good faith in Common<sup>16</sup> law jurisdictions, which notwithstanding their emphasis on the pursuit of self-interest, has reached an unprecedented extension, as is made evident with the recent Canadian and Irish cases of *Bhasin v. Hrynew* and *Flynn v. Breccia*.<sup>17</sup>

This chapter is structured as follows. Section 2 will engage with the former trend in light of the modern constitutional project as epitomised by Hobbes’ social contract theory. Section 3 will prepare the ground for the neorealist contextualisation of the latter phenomenon by reflecting on Comparative

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<sup>15</sup> Both terms refer to the belief that governments should educate consumers and build or reform institutions to regulate economic activities according to rational global standards determined by outsiders. See Siliquini-Cinelli (2015a, 2015b).

<sup>16</sup> I use capital ‘C’ to refer to the Common law as a legal tradition. Common (with an uppercase c) law and common law are two different things: while the former is a legal tradition marked by a number of particular characteristics, the latter refers to only a part of the Common law (and includes elements of both case law and Customary law).

<sup>17</sup> [2014] SCC 71 (Supreme Court of Canada) and [2015] IEHC 547 (Irish High Court) respectively. The growing relevance of good faith in the Common law tradition may also be witnessed in the (not linear and at time inconsistent) developments of the subject in England, Australia, New Zealand, and Scotland (a mixed legal jurisdiction). Cf. *Lymington Marina Ltd v MacNamara* [2007] Bus LR Digest D29 (England and Wales Court of Appeal (Civil)); *Socimer International Bank Ltd v Standard Bank London Ltd*, [2008] 1 Lloyd’s Rep 558 (England and Wales Court of Appeal (Civil)); *Yam Seng Pte Ltd v International Trade Corporation Ltd*, [2013] EWHC 111 QB (England and Wales High Court (Queen’s Bench)); *North East Solutions Pty Ltd v Masters Home Improvement Australia Pty Ltd* [2016] VSC 1 (Supreme Court of Victoria); *Paciocco v Australia and New Zealand Banking Group Limited*, [2015] FCAFC 50 (Federal Court of Australia); *Mineralogy Pty Ltd v Sino Iron Pty Ltd*, (No 6) [2015] FCA 825 (Federal Court of Australia); *Commonwealth Bank of Australia v Barker* [2014] HCA 32 (High Court of Australia); *Bobux Marketing Ltd v Raynor Marketing Ltd*, [2002] 1 NZLR 506 (Court of Appeal of New Zealand); *Smith v Bank of Scotland*, [1997] SC (HL) 111 (House of Lords).

It seems that the courts shared Martijn W. Hesselink’s conviction that ‘common law lawyers should not fear the concept of good faith.’ See Hesselink (2010), p. 648. *Contra*, arguing that good faith in the performance of contracts ‘is not a concept foreign to the common law’, see Allsop JC’s remarks in *United Group Rail Services Ltd v Rail Corporation New South Wales*, [2009] NSWCA 177, para 634 [58] (New South Wales Court of Appeal), and in *Paciocco v Australia and New Zealand Banking Group Limited*, cited above, para 287. To be compared to Bingham LJ’s statements in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, paras 439 and 445. See also Rowly and Rawlings (2005), p. 83. See also below, note 141. See also Carter (2012), p. 22. Given the scope of this contribution, in the following pages I will not deal with the content of these judgements, nor with their analytical repercussions. Suffice to say that in *Bashin*, before awarding to good faith the status of an *organising principle* ‘in order to make the common law less unsettled and piecemeal, more coherent and more just’ (at [33]), Cromwell J discussed the US scenario and endeavoured in a comparative enterprise among Common law jurisdictions to point out how, from the UK to the Australia, the doctrine of good faith has become increasingly important in recent years. Yet it would be prudent to set the US apart from comparable cases because of its well-known ‘exceptionalism’, which in contract law assumes the form of the peculiar relationship between the Anglo component of its legal system as a whole and a code (the Uniform Commercial Code) in which, along with the doctrine of fair dealing, the duty to act in good faith is normativised. For a compelling account on the role that good faith and bad faith play in American Public law, see Pozen (2016).

law's status and methodologies of inquiry at the time of writing. Section 4 will then move on to comparing the humanising, active role that good faith plays in Contract law theory and practice with Hobbes' juridical-institutional model of society. Concluding remarks will follow.

## 2      **The *Pactum* at the Public Level**

Authority and sovereignty disappeared in the West long ago, when power absorbed them both. As I have been claiming for some time now, the substitution of authority and sovereignty with power has occurred alongside the absorption of the (self-defining, historical and political) negativity of action and experience by the (self-dissolving, post-historical and post-political) positivity of behaviour and knowledge.

The effects of this artifice have become particularly noticeable since the fall of the 'bipolar' system. Several data suggest indeed that what the Western paradigm of global civilisation has been undergoing since the end of the 'bipolar' age is a two-pronged trend. At the public level, the sovereign and authoritarian character of the *pacta sunt servanda* doctrine appears to have been increasingly weakened by the force through which soft-networked mechanisms of managerial post-national governance displace the irreducibility of foundation that characterises both political action<sup>18</sup> and any constituting initiative. The shift from 'input' (negative) to 'output' (positive) forms of legitimation and accountability in which post-national governance's liquid working logic is rooted may be used to support this argument. The same may be said with respect to the fact that constitutionalism is said to have become conceptually transnational,<sup>19</sup> or that public autonomy has ceased to be relevant,<sup>20</sup> and that the basic conceptual configurations of the kinopolitical paradigm of our time (i.e., movement) have no origin.<sup>21</sup> If we are all 'migrants' rather than 'citizens', it might be noted, it is because the functioning of flows, junctions, circulations, circuits, and recirculations drains the constitutive properties of political action by giving priority to the dynamism that keeps our post-historical and post-political condition alive.

Similarly, the fast-developing spread of fluid schemes of global governance seems to indicate that our current inhuman condition is due to what Agamben has defined as the 'complete confusion'

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<sup>18</sup> It should be clarified at this early stage that, contrary to Arendt, I conceive of the 'will' as a vital component of political action. See Siliquini-Cinelli (2015b).

<sup>19</sup> Zumbansen (2012); Goderis and Versteeg (2015). See sections 3 and 4, below.

Arendt's insight into the vanishing of (legal and political) authority may be of assistance here. In her words, the loss of authority 'is tantamount to the loss of the groundwork of the world, which indeed . . . has begun to shift, to change and transform itself with ever-increasing rapidity from one shape into another. . . '. See Arendt (2006), p. 95. See also *ibid.* p. 91, and (2006), pp. 171–206. Yet some commentators might contend that this depends on how the transposition of constitutions to external arenas is historically interpreted. See Frankenberg (2012).

<sup>20</sup> Somek (2012), p. 58.

<sup>21</sup> Nail (2015), pp. 21–38.

between ‘juridification and commodification of human relations’.<sup>22</sup> Therefore it seems difficult to dispute that, as Negri has summarised, ‘[t]he passage from government to governance infringes [upon] the unitary regulation of the systems of public law’.<sup>23</sup>

On the contrary, I submit, the notion of contractual good faith as an organising principle or implied duty is increasingly (and perhaps unconsciously) used within the Private law dimension as a tool to counter-balance this dehumanising phenomenon.<sup>24</sup> An inquiry into the intensification of the use of the doctrine of good faith in Common law countries—that is, in jurisdictions whose Contract law is underpinned by the behavioural logic of consideration—from a post-humanist<sup>25</sup> perspective would prove that, at least to a certain extent, contracts are being used as an instrument of government rather than governance.<sup>26</sup>

The contract’s paradoxical development may not only serve either to confirm or question the above suggestions on the status of the public sphere, but may also shed new light on what unites the demise of law’s anthropological and sociopolitical functions with the essence of our dehumanised condition, as well as with the use of biopolitics as its signature.<sup>27</sup> This in turn depends on our ability and willingness to interpret correctly what the *pactum* has been experiencing in both public and private dimensions. For my own part, I believe that the starting point of such an intellectual endeavour should be Arendt’s account of the Hobbesian strategy to preserve the bourgeois’ economic interests and imperialist expansion. In particular, according to Arendt, the artificial birth of the Leviathan was based ‘not on some kind of constituting law . . . which determines the rights and wrongs of the individual’s interest with respect to public affairs, but on the individual interests themselves.’<sup>28</sup> This is so because ‘[p]ower, according to Hobbes, is the accumulated control that permits the individual to fix prices and regulate supply and demand in such a way that they contribute to his own advantage’.<sup>29</sup>

Arendt’s claim is lent considerable support by Weiss and Hobson’s exemplary study on the symbiosis between modern state formation and economics,<sup>30</sup> Gellner’s historical reconstruction of the rise of economic nationalism between the sixteenth and eighteenth centuries,<sup>31</sup> Thornhill’s contention that in many cases statehood depends on transnationalism, and O’Donoghue’s description of

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<sup>22</sup> Agamben (2012), p. 40. To be compared to the notion of ‘mercatorocracy’ used by Cutler (2003).

<sup>23</sup> Negri (2010), p. 217.

<sup>24</sup> Supiot (2007), pp. 83 and 103, correctly links the ‘weakening of the State’ brought about by the processes of ‘(re-)territorialization’ to the ideology of ‘contractualism’.

<sup>25</sup> The label ‘post-humanist’ refers to the need to protect and promote human values and Fundamental Rights through politics and justice whilst at the same time neutralising humanism’s secular *exclusions*. The increase in inequality brought about by the (allegedly civilising) globalisation of trade is testament to this. See Rosanvallon (2013); Siliquini-Cinelli (2015b).

<sup>26</sup> Zumbansen (2007).

<sup>27</sup> Siliquini-Cinelli (2015a).

<sup>28</sup> Arendt (1973), p. 139. See also Arendt (2005), pp. 98–99.

<sup>29</sup> Ibid.

<sup>30</sup> Weiss and Hobson (1995);

<sup>31</sup> Gellner (1983).

constitutionalism as an instrument of ‘governance’ rather than ‘government’.<sup>32</sup> The revolutionary lucidity of Arendt’s argument may therefore help us uncover the limits of classic approaches to the modern constitutional process, and thus uncover the relationship between the double-featured condition undergone by the contract at the time of writing.

Martin Loughlin’s scholarship on Hobbes and sovereignty may serve as an example. In one of his major works, *The Idea of Public Law*, Loughlin has defined sovereignty not only as ‘the foundational concept underpinning public law [which] stands as a representation of the autonomy of the political’, but also as ‘a function of the institutional arrangements established as a consequence of the formation of the modern state’.<sup>33</sup> The conceptualisation of ‘the people’ as a collective political actor is then rooted in the foundation of the sovereign state and idea that public power acquires an ontologically autonomous status.<sup>34</sup> Thus, to Loughlin, sovereignty is a never-ending politico-relational enterprise between constituted and constituent powers. In promoting this regulatory view, Loughlin also explained why, being autonomous, political power cannot be encapsulated within a specific place once and for all, but must be let free to circulate and express itself in every political relationship.<sup>35</sup>

I agree with Tierney that Loughlin’s account ‘helps us to bypass two caricatures prominent within public law scholarship’ in the UK, namely the ‘law as politics’ and the ‘pure theory of positive law’.<sup>36</sup> More precisely, I share Loughlin’s belief in the importance of distinguishing between the *political conception* of sovereignty from its *institutional configuration*—a view that recalls the politico-theological distinction between *creatio* and *conservatio*, and in particular Erich Peterson’s 1935 separation between *kingdom* and *government*.<sup>37</sup> However, Loughlin’s contention that as long as ‘novel institutional arrangements’ do not affect ‘the question of “ultimate” authority’, sovereignty is preserve<sup>38</sup> does not help us appreciate that the substitution of political government with administrative governance occurred along the path initiated by power’s absorption of authority and sovereignty.

Similarly, Loughlin’s account of the Hobbesian contractarian model of sovereignty falls short of offering us the tools that we need to understand the unofficial essence of the nation-state’s building process in its entirety. I refer particularly here to Loughlin’s suggestion that Hobbes’ social contract theory is ‘a purely juristic account of the state’.<sup>39</sup> This is a view that is entirely different from Arendt’s argument that ‘Hobbes’ picture of man defeats his purpose of providing the basis of a Commonwealth

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<sup>32</sup> O’Donoghue (2014).

<sup>33</sup> Loughlin (2003), pp. 93 and 80, respectively.

<sup>34</sup> Ibid. p. 78. From this it inevitably follows that the concept of constitutional pluralism is an oxymoron. See Loughlin (2014).

<sup>35</sup> Ibid., p. 83.

<sup>36</sup> Tierney (2008), p. 15.

<sup>37</sup> Agamben (2011).

<sup>38</sup> Loughlin (2003), p. 95; Loughlin (2008), pp. 56–59. Similar suggestions are made by many. Others argue instead for the possibility of relativising the concept of legitimacy/authority itself. See van der Vossen (2011); Roughan (2011). See also the (2013) 4(3) Issue of *Transnational Legal Theory*.

<sup>39</sup> Loughlin, (2015), p. 6. See also Loughlin (2012), p. 282: ‘The modern constitution is . . . conceived by Hobbes to be a contract entered into by the people to establish a comprehensive framework through which the institutions of government are established and the exercise of their powers regulated’.



and gives instead a consistent pattern of attitudes through which every genuine community can easily be destroyed'.<sup>40</sup>

Hence, I would rather suggest that we commence our attempt to ascertain the condition of the *pactum* at the public level with Arendt's and Agamben's shared interest in what the constitution and development of the nation-state has revealed about the subjects of biopolitics. Notwithstanding the different trajectories of their thoughts,<sup>41</sup> the common denominator in Arendt's and Agamben's scholarship is indeed that no rights can be guaranteed to those who are deprived of membership in a political community.

Agamben famously argued that the politico-juridical figure of the Western tradition is that of *homo sacer*, that is, of a man who cannot be officially killed, and yet, should such a killing occur, no one would be held responsible. This figure has emerged through the formation of a zone of indistinction between bare life (*zoē*) and political existence (*bios*), mentioned earlier. Hence, *contra* Foucault, Agamben showed that the biopolitical violence that humans experience daily, and that reached its culmination with the Nazi death camp, had its inception long before modernity, at the point when the regulative apparatus of the *oikonomia* first emerged;<sup>42</sup> rather, the modern nation-state has merely placed biopolitics 'at the centre' of its own 'calculations' by using the declaration of rights as a way to blur the distinction between bare life and its political counterpart. More particularly, '[d]eclarations of rights represent the originary figure of the inscription of [the] natural into the juridico-political order of the nation-state'.<sup>43</sup>

What matters for the scope of our discussion is that Agamben assigned to the formation of bourgeois democracy and the voiding of the distinction between public and private a key role in this process. Similarly, Arendt referred to the intrusion of the bourgeois' emancipation into the realm of the political to point out that Hobbes' cruel artifice stands in clear opposition to the notions of political freedom and political community out of which, we are told, the modern constitutional initiative arose.<sup>44</sup> The reason for this is that both concepts depend on 'the company of other men who [are] in the same state, and . . . [need] a common public space to meet them—a politically organised world . . . into which each of the free men could insert himself by word and deed'.<sup>45</sup> Conversely, '[w]here men live together but do not form a body politic', this peculiar form of freedom does not manifest itself: '[w]ithout a politically guaranteed public realm, freedom lacks the worldly space to make its appearance'.<sup>46</sup> For the constitution of a body politic to occur, the subjects must have the capacity to enjoy political freedom through deed and action; that is, they must have the political 'capacity to act', as Barbour has rightly

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<sup>40</sup> Arendt (1973), p. 140. On this point, see also Franz Borkenau's scholarship on Hobbes.

<sup>41</sup> Agamben (2016), p. 23. For an introduction, see Liska (2013).

<sup>42</sup> Agamben (2011); see also Agamben (2007); Agamben (2012); Agamben (2013); Agamben (2015).

<sup>43</sup> Agamben (1998), pp. 6 and 127. See also *ibid.* p. 121; Agamben (2016), p. 263, where Agamben seems to contradict himself on the use of the terms 'natural' and 'bare' life.

<sup>44</sup> Arendt (1998), p. 68.

<sup>45</sup> Arendt (2006), p. 147.

<sup>46</sup> *Ibid.* See also *ibid.* p. 153

noted.<sup>47</sup> This definition of the body politic is clearly related to what Arendt argued about the disappearance of the ‘private/public’ sphere divide as brought about by the socialisation of humankind’s existence.<sup>48</sup> In particular, Arendt’s conceptualisation of political freedom and the role that the spontaneity of political action plays in its formation and protection can be overlapped with her metaphorical description of the public realm as a ‘table’ that prevents the ‘people gathered around’ from ‘falling over each other’.<sup>49</sup>

If Agamben’s biopolitical reconstruction and Arendt’s contentions about the rise of society, nature of the body politic, and Hobbes’ instrumentalist strategy are correct, it would mean that, in his fight against the fear of death (*homo homini lupus*), Hobbes aimed at more than simply securing the stability and peace humans need for self-preservation. More particularly, Arendt’s claims lead one to think that the nation-state is perhaps the West’s greatest paradox of the last three centuries: the same (exceptional, as Schmitt would say) sovereign contractual-constitutionalising process of pure, immediate, and simultaneous ‘potentiality’ and ‘actuality’<sup>50</sup> that led to the essential positivistic formation of the modern form of polity, and whose humanitarian façade was aimed at guaranteeing our existential political freedom through the safety of the newly formed community (*homo homini deus*), is best understood as a politico-juridical fiction put forward for speculative reasons.

The influence that Stoic universalism has had on the development of Western tradition and formation of the modern nation-state<sup>51</sup> further confirms that what we are dealing with is but a process that commenced long ago. From this it follows that Hobbes’ illusory device leaves us with an interrogative of the first order regarding our inhuman condition: whether the modern form of politico-national community into which we think we were born—and whose signification, we argue, has been transcended by its ‘post-’ variant<sup>52</sup>—ever actually existed. More than fifty years ago, MacPherson insisted that it did not. More precisely, while explaining why ‘the seventeenth-century concepts of freedom, rights, obligation, and justice are all [shaped] by [the] concept of possession’, MacPherson argued that Hobbes wanted to establish a ‘possessive market society’, and demonstrated that for

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<sup>47</sup> Barbour (2013), p. 307. (Emphasis added).

<sup>48</sup> Arendt (1998), pp. 28 and 46

<sup>49</sup> Arendt (1998), p. 53. See also Agamben (2005), pp. 95 and 106.

The table metaphor recalls Heidegger’s (otherwise very different) scholarship on the role of ‘nearness’ in every *act* of ‘ek-sistence’. In Heidegger’s words, ‘the human being, existing as a transcendence that exceeds in the direction of possibilities, is a *creature of distance*’. See Heidegger (1998), p. 135.

<sup>50</sup> Agamben (1998), pp. 44–48

<sup>51</sup> Cassirer (1946), pp. 163–75.

<sup>52</sup> The founding of dedicated law journals and book series, as well as the launch of new undergraduate and postgraduate courses in transnational and global law worldwide, are testament to this subject’s increasing relevance within legal discourse. For present purposes, in addition to Teubner’s scholarship on post-national societal constitutionalism, see Twining (2009); Kuo (2010); Handl, Zekoll, and Zumbansen (2012); Dobner and Loughlin (2012); Walker (2012); Krisch (2012); Amhlaigh, Michelon, and Walker (2013); Zumbansen (2013); Helfand (2015). See also the (2008) 6(3)–(4) Special Issues of the International Journal of Constitutional Law on the symposium ‘Constitutionalism in an Era of Globalization and Privatization’, and the interview with Canada’s Prime Minister Justin Trudeau in the *New York Times*, in which Canada is defined as the ‘first post-national state’, Available at: [http://www.nytimes.com/2015/12/13/magazine/trudeau-canada-again.html?\\_r=0](http://www.nytimes.com/2015/12/13/magazine/trudeau-canada-again.html?_r=0) Accessed 15 February 2016.

Hobbes, the state of nature is already a community of ‘civilised’ people. From a sociological perspective, ‘[Hobbes’] state of nature is a statement of the behaviour to which men as they now are, men who live in civilized societies and have the desires of civilized men, would be led if all law and contract enforcement . . . were removed’. Thus ‘[t]he state of nature is a deduction from the appetites and other faculties not of man as such but of civilized men’.<sup>53</sup>

Yet it could be objected that MacPherson’s argument is not of great assistance to us, as it is well known that the Hobbesian state of nature has never been a real epoch in historical terms but merely represents ‘a principle internal to the City’.<sup>54</sup> The point, however, is that Hobbes fictionally referred to an ahistorical, and thus inhuman, model of society to elaborate on a concept of sovereign power and body politic that equally rejected what makes us human. Thus Arendt claimed that Hobbes’ political roadmap ‘exclu[ded] in principle . . . the idea of humanity’.<sup>55</sup> For different reasons and through different patterns of inquiry, Agamben too uncovered the illusory humanitarian character of the nation-state by identifying a link between its secular functioning and the administrative apparatus of the Church: considering that ‘theology [has] resolv[ed] itself into atheism’ because of the administrative regulative model prompted by the Church, ‘[m]odernity, removing God from the world, has not only failed to leave theology behind, but in some ways has done nothing other than to lead the project of the providential *oikonomia* to completion’.<sup>56</sup> If that is the case, then the fact that ‘popular sovereignty [is] by now an expression drained of all meaning’<sup>57</sup> comes as no surprise: it is the inevitable outcome prompted by the working logic of the Western politico-juridical conception according to which human existence and interaction ought to be *managerially administered* rather than *politically governed*.

A neorealist<sup>58</sup> comparison between the contractarian and allegedly humanitarian narrative of the rise of the Leviathan and the biopolitical essence of the nation-state shows, then, that the proposed distinction between modernity and what came after it – namely our global, transnational age – is misleading.

### 3 On Comparative Law and Its Method(s): Knowledge vs Experience

Before going any farther with our inquiry, a methodological clarification is in order. Some commentators would indeed deem the aim of this contribution to be pretentious, or at least inappropriate, from a purely Comparative law perspective. This would be a conservative reaction to the fact that, over the last two decades, Comparative law has branched out in new directions, galvanising legal theorists and practitioners, sparking novel sociopolitical, legal, and business models, and attracting

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<sup>53</sup> MacPherson (1962), pp. 3, 22, 29, and 46.

<sup>54</sup> Agamben (1998), p. 105.

<sup>55</sup> Arendt (1973), p. 157.

<sup>56</sup> Agamben (2011), pp. 286–87. See also Agamben (2015), pp. 42–69.

<sup>57</sup> Agamben (2012), p. 4

<sup>58</sup> D’Agostini (2014).

worldwide attention. Despite arguments to the contrary, Comparative law has thus become a key instrument of thought. The need that has emerged in recent years to introduce the reader to Comparative law discourse,<sup>59</sup> as well as the multitude of studies that have appeared on its method(s) and culture(s),<sup>60</sup> are indicative of the fact that ‘comparative law is constantly evolving, in imperfect parallel with the development of law, and society, at large’.<sup>61</sup>

This attitude has had an inevitable impact on the boundaries, and thus identity, of Comparative law itself, as is demonstrated by the way in which scholars from different disciplines have contributed to what was once seen as an exclusively internal debate. This was primarily caused by the attraction that the concept of (legal) ‘culture’ (and thus, I would add, ‘consciousness’ in Gadamerian terms) began to develop for comparatists, and by the subsequent need to clarify what it could reveal and eventually lead to.<sup>62</sup> Fletcher’s belief that the value of applying the comparative inquiry to the legal domain lies in the fact that ‘it expands the agenda of available possibilities’<sup>63</sup> is a clear testament to this in that it poses the basis for cultural criticism. It cannot be doubted that while trying to understand the political relationship between law’s regulative instances and those it tries to protect by imposing respect for itself and/or stimulating that respect, comparatists, legal sociologists and, in part, legal anthropologists and historians have entered each other’s areas of specialisation; they have ‘borrowed’ notions, doctrines, methodologies and strategies in adopting the same constructivist logic of ‘transplant’ that the majority of them criticised when arguing for the need to respect what identifies the ‘other’.

This doctrinal trend deserves an extended treatment, certainly more than can be provided here. It must thus suffice to highlight that the uniqueness that characterises the comparative method and its aims has certainly been influenced by it—positively or negatively, depending on the perspective of inquiry. The issue then arises as to whether this scholarly approach to Comparative law poses a threat to law’s existential special domain<sup>64</sup>—that is, to the essence of the authoritarian and sovereign institutionalising processes that render law properly legal within normative discourse and power theory. Perhaps the answer to this interrogative may be found in the extent to which the crucial distinction between *social rules* and *legal norms* has been mistakenly displaced from view within legal discourse. And indeed, it is indicative of the confusion that affects the debate that we have reached a stage at which it is thought that the comparative assessment of legal phenomena may be done through the analysis of ‘empirically substantiated *behavioural* patterns’,<sup>65</sup> thus obscuring how and why law’s mythical essence and anthropological and sociopolitical existential function depend on the subject’s free action.<sup>66</sup>

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<sup>59</sup> Husa (2015); Tushnet (2014); Samuel (2014); Smits (2014), Örüci and Nelken (2007); Gordley (2006).

<sup>60</sup> Adams and Heirbaut (2014); Adams and Bomhoff (2012); Van Hoecke (2011); Van Hoecke (2004); Siems (2014); Monateri (2012); Clark (2012).

<sup>61</sup> Michaels (2015), p. 1.

<sup>62</sup> Legrand and Munday (2003); Nelken, Feest (2001); Nelken (1997).

<sup>63</sup> Fletcher (1998), p. 69.

<sup>64</sup> In addition to Cotterrell’s (2013), p. 23, scholarship on law ‘as a flexible, but distinctive and unifying, value structure’ with ‘a specific effectivity’, see Berteau (2009) and Croce (2014).

<sup>65</sup> de Coninck (2010), p. 348; de Coninck (2012). See also Parisi and Luppi (2012).

<sup>66</sup> Siliquini-Cinelli (2015a).

Yet it could be conceded that this may be an inevitable outcome in an age of numberless processes of diversification or fragmentation—i.e., of pluralisation of regulative sources and norm-setting bodies at the macro, meso, and micro levels, as well as of ‘regime shifting’<sup>67</sup> mechanisms. Hence Séan Patrick Donlan rightly pointed out that Comparative law’s ‘methodological pluralism’ has become the ‘norm’ in Comparative law.<sup>68</sup> Having a multidisciplinary approach to (comparative) law and legal reasoning is indeed indispensable to overcoming the limits of reductionist approaches.<sup>69</sup> Pihlajämaki’s belief that ‘[w]e should not become obsessive about defining disciplinary boundaries now that we have finally managed to start removing them’<sup>70</sup> is therefore more than welcome. Yet every interdisciplinary method may also prove to be unsatisfactory.<sup>71</sup> The time seems therefore ripe to admit that the confusion that this process has generated constitutes not the consequence, but rather the cause, of why, in Örüci’s words, ‘the basic problems [of comparative law] have remained the same’, and why ‘[t]here is no one definition of what comparative law and comparative method are’.<sup>72</sup> Millns’ consideration that ‘the methodology of legal comparison remains relatively unadvanced’ should thus be investigated from this critical perspective.<sup>73</sup>

From a purely methodological point of view, this means that the two main questions upon which the comparative enterprise within the legal discourse is based, namely ‘what is law’ and ‘what is comparison’,<sup>74</sup> are still to be answered. Thus, if one seeks a better understanding of what Comparative law is about, s/he would have to make sense of a series of arguments according to which various things should be compared. These things include cases (Markesinis); legal systems or their rules (Watson); the relationship among system theories (or assumptions and idea) as forces capable of ‘structuring’ legal rules (Luhmann, Valcke); legal systems and their institutions (Bell and, in part, Örüci); the evolutionary stages of legal concepts and legal institutions (Gutteridge); legal rules in context (Siems, and Örüci, who includes in this notion ‘the mysteries of the interaction of social norms and legal rules’<sup>75</sup>); (legal) attitudes (and, thus, commitments) and (concepts of) laws intended neither as ‘real/objective facts’ nor as (positivistic) ‘rules’ as ‘acts of communication’ (Van Hoecke, Samuel); legal institutions and the ‘prevailing styles of legal thought’ (Ewald); legal arguments or the language used in them (Bomhoff, Fletcher respectively); institutions and the intellectual structures that express them (Sunde); sets of legal rules, legal domains, forms of legal reasoning (Valcke and Grellette); legal-cultural developments and their adaptation (Nelken); the ‘cognitive structure’ of a legal culture (Legrand, whose quotation usually

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<sup>67</sup> Benvenisti and Downs (2007); Zürn and Faude (2013).

<sup>68</sup> Donlan (2014).

<sup>69</sup> Redgwell (2012); Siliquini-Cinelli (2014).

<sup>70</sup> Pihlajämaki (2014), p. 121.

<sup>71</sup> Husa (2014b).

<sup>72</sup> Örüci (2007), p. 43. A suggestion that seems to be supported by Cotterrell’s (at times ambiguous) belief that comparative law’s and legal sociology’s ‘most general and most scientific projects—to understand law in its development and its variety as an aspect of social life—are identical’ see Cotterrell (2003), p. 134.

<sup>73</sup> Millns (2014), p. 285.

<sup>74</sup> Samuel (2014a); Samuel (2014b); Samuel (1998).

<sup>75</sup> Örüci (2007), p. 58.

leads to that of Watson in light of the debate which their opposing approaches to legal transplants has generated); concepts of law (Donlan, Heckendorn, Van Hoecke, Husa, Nelken, Melissaris, and other legal pluralists); historical developments in the law (Donlan); legal traditions as ‘sets of information’ (Glenn), legal ideologies (Cotterrell); the economic efficiency of a norm (Parisi, Luppi); EU policies and their implementation (Knill); and legal anthropologies (Mertz, Goodale) and physiologies (Horry, Plamer, Brewer, Cutler). Stemming from the broad field of Public/Constitutional and Administrative Comparative law, we could also include in the list judicial politics (Chavez, Ginsburg, Vanberg, Hirschl, Halberstam, Sheppele), the development of constitutional scholarship (von Bogdandy), and counter-terrorism laws (Kent, Roach).

William Twining is therefore right when he writes that ‘comparative law has not defined subject-matter’.<sup>76</sup> In addition, if Comparative law has witnessed an explosion, as Smits noted,<sup>77</sup> this has surely been responsible for methodological confusion. It thus cannot surprise anyone that it was the comparatists themselves who blurred one of the most important distinctions behind what makes us human—namely that between ‘knowledge’ and experience—a distinction that, I believe, should be rediscovered and vehemently promoted in the challenge to our behavioural ‘form-of-(non-)living.’

Indeed, Comparative law is either—and simultaneously and/or indirectly<sup>78</sup>—understood as a *discipline/technique/intellectual activity* (Frankenberg, Muir Watt, Van Hoecke, Glenn, Fletcher, Hage, Örüci, Michaels, Samuel, Bell, Adams, Jansen, Löhnig, Monateri, Andenas, Fairgrieve, Rosenfeld, Sajó, Clark, Stapleton, von Bogdandy), as a *science* (Rabel, Sacco, Gutteridge, Örüci, Van Hoecke, Millns, Husa, Hage, Cotterrell, Samuel, Bell, Grossfeld, Valcke, Grellette), or as an act of (local and cultural) *experience* (Curran, Millns, Nelken, Örüci, Grossfeld, Sunde, Adams, Cotterrell, Brownsword, Legrand, Bell, Lasser, Husa, King, Dupret—a vision that has been endorsed by those who understand the legal phenomenon in terms of a ‘shared normative experience’<sup>79</sup>). Finally, there are commentators who, in addressing Comparative law’s functional attitude as put forward by Zweigert and Kötz (and further pursued by Husa, Michaels, de Coninck, and in part, Valcke, and Grellette), make

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<sup>76</sup> Twining (2000), p. 45. On comparative law’s limits in overcoming the challenges that globalisation poses to legal scholarship, see Goodwin (2013), pp. 692–94.

<sup>77</sup> Smits (2006).

<sup>78</sup> I think here of Husa (2014a), p. 55, who, while arguing in favour of ‘epistemological realism’ to overcome the comparatist’s dependence on ‘his/her *experience* of the world’, describes ‘comparative law as a target-oriented *action* aimed at new *knowledge*’. This is also the case with Valcke and Grellette (2014), p. 101, who first suggest that ‘any comparison . . . entails first delineating the objects in a *neutral* way’, and yet maintain that ‘*this* delineating *act* is particularly delicate when it comes to law’. The ‘this’ clearly takes us back to comparison, broadly understood. The active experience of the comparatist seems therefore to appear in there as well, notwithstanding the neutrality of the operation Valcke and Grellette describe. Moreover, the semi-neutral essence of this *modus comparandi* seems to be further confirmed when Valcke speaks of the ‘*act* of comparison’ when discussing again the comparative method in general. This is a term that Valcke uses to highlight the ‘interpretative’ essence of comparative law. See Valcke (2012), p. 48; see also Bell (2011). Thus, even though Van Hoecke (2014), p. 45, does not share Valcke’s approach to comparative law, it seems that Valcke and Grellette ultimately agree with him that ‘[t]here are not “objective” choices, but only “subjective” ones’. Valcke and Grellette (2013), p. 10.

<sup>79</sup> Melissaris (2009); Melissaris (2014).

a claim for the impossibility of reducing its aims to a single methodology of inquiry (Gutteridge, Örüci, Glenn, Brownsword, Adams, Griffiths, Donlan, von Bar, Karhu); others, however, argue for the importance of recognising the possible ‘subversive’ attitude of Comparative law (Fletcher, Muir Watt), or of having a legal-hermeneutical (Legrand), legal-cultural (Van Hoecke and Warrington), cultural-epistemological (Samuel), heuristic (Husa) or descriptive or purposive approach to it (McEvoy, Valcke).

The variety of these approaches is clearly rooted in the multiple substrata that characterise law’s ‘norm-alising’ enterprise. In addition, their pluralistic essence is informed by the roadmap pursued by contemporary legal scholarship broadly understood, which is to use the ‘multiple shifting boundaries of law—as discipline, as practice, as focus of study, as form of knowledge’<sup>80</sup> to try to explain *the* law’s detachment from the state. More importantly for our purposes, from a purely Comparative law perspective, these accounts seem to find a unifying sentiment in the belief that the comparative method is an ‘empirical, descriptive research design using “comparison” as a technique to cognise’,<sup>81</sup> as well as in those accounts that define Comparative law in terms of a multi-featured ‘disciplined practice’.<sup>82</sup> Considering, on the one hand, Pascal’s suggestion that there is nothing in the real world that can escape the explanatory temptation of scientific reason and, on the other hand, the wave of disciplinary borrowing described above, it is anything but a coincidence that these claims seem to be in line with the school of thought according to which culture is a ‘moral and *cognitive experience*’ and that ‘[a]ny juristic study is . . . a social practice, an intervention in the social world and a way of interpreting that world’<sup>83</sup>).

In this respect, what is surprising about the dynamics these accounts express is the extent of the displacement of the anthropological and philosophical difference between ‘knowledge’ (*cognitum*) and ‘experience’ (*nōtum*), or between behaviour and action, objective scientific reason that opens a space that remains empty<sup>84</sup> and subjective being-in-*there* that fills that space. Among other factors, this dichotomy has informed the very essence and development of the Western tradition since Pythagoras. It would be beyond the scope of our analysis to describe its emergence and trajectory to date. It must suffice to spend a few words on those thinkers whose reflections may help explain what will be claimed in the next section of this contribution, namely Heidegger, Cassirer, and Agamben.

Heidegger thought it necessary to reconsider completely the problem of knowledge in order to demonstrate that it cannot be solved by distinguishing between subject and object. Through a reasoning that will take him close to Parmenides’ insights,<sup>85</sup> Heidegger challenged the metaphysical assumptions

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<sup>80</sup> Dedek and van Praag (2015), p. xv.

<sup>81</sup> Örüci (2007), p. 48.

<sup>82</sup> Adams and Bomhoff (2012), p. 4.

<sup>83</sup> Cotterrell (2008), pp. 308 and 43 respectively (emphases added). See also Cotterrell (2012).

<sup>84</sup> Kahn (2010), p. 175, according to whom ‘[r]eason is not self-defining’. See also Kahn (2008).

<sup>85</sup> Although in a different way, Heidegger put forward this argument throughout his scholarship. See paragraphs 12–13 of *Being and Time*, as well as *On the Essence of Truth*, *Letter on Humanism*, *The Thing*, *The Age of World Picture*, *Introduction to Metaphysics*, *What is Called Thinking?*, *Identity and Difference*, *Discourse on Thinking*,

of scientific knowledge by reaffirming the primacy of man's phenomenological 'ek-sistence' against the illusion brought about by the Western 'onto-theo-logical' tradition as initiated by Plato and Aristotle. This also led him to challenge both the functionalisation of the spirit and modern subjectivism as prompted by Descartes, according to whom knowing is the primary mode of interaction between the subject and an object. To the contrary, Heidegger pointed at what precedes the *cogito*. By delving into the original and modern meanings of (scientific) method, *technē*, and *ēpisēme*, Heidegger insisted on *Dasein*'s phenomenological encounter with what constitutes its 'ek-sistence'.<sup>86</sup> Yet, as will be discussed towards the end of the chapter, the 'unfolding' of this phenomenon depends, in turn, on our *willingness* 'to stand in the openness of beings'.<sup>87</sup>

In a no-less-revolutionary and yet completely different way, Cassirer united several opposing claims when inquiring into the cultural debacle of modern times, which in his view is related to science's focus on the cause of phenomena and its aim to simplify the accidental particularity of reality and our experience of it. In particular, Cassirer was of the opinion that human experience had always been 'an organized and articulated experience'.<sup>88</sup> 'What is commonly called the sensory consciousness, the content of the "world perception"', he wrote in the second volume of *The Philosophy of Symbolic Forms*, '... this is itself a product of abstraction, a *theoretical* elaboration of the "given"'.<sup>89</sup> This theoretical process is nothing but 'perceptive knowledge': '[a]ll conceptual knowledge is necessarily based on intuitive knowledge, and all intuitive knowledge on perceptive knowledge'.<sup>90</sup> This explains why 'symbolic expression is the common denominator in all [man's] activities'.<sup>91</sup> From this it flows that the problem of human knowledge cannot be understood without delving into the relationship between man and the symbolic forms that reality (and, thus, the experience we make of it) may assume.<sup>92</sup> As was pointed out in the essay known in English as *The Logic of the Cultural Sciences*, this is so because neither (scientific) thought nor experience 'is able to determinate the "initself" of man except by pointing it out in the phenomena'.<sup>93</sup> Thus, 'instead of saying that the human intellect is in need of "images" we should rather say that it is in need of symbols' as 'refracting media'.<sup>94</sup> In contrast with Heidegger, Cassirer thus found in the phenomenology of the symbol(s) the way to explain why the

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<sup>86</sup> Heidegger (2008), p. 88. See also *ibid.*, p. 237.

<sup>87</sup> Heidegger (2014), p. 24. See also *ibid.*, pp. 15, 23–24, 33, 49, and 189. See below note 173.

<sup>88</sup> Cassirer (1944), p. 208. See also *ibid.*, pp. 29, 34, 60, and 73.

<sup>89</sup> Cassirer ([1925] 1955), p. xvi (emphasis added). See also Cassirer ([1923] 1955), pp. 89, 107, 111, and 114; Cassirer (1957), p. xiii.

<sup>90</sup> Cassirer (1957), p. 47. Cotterrell's notion of 'cognitive experience', mentioned earlier, is in line with this form of perceptive knowledge.

<sup>91</sup> Cassirer (1946), p. 45.

<sup>92</sup> See, in particular, Cassirer (1996), pp. 194–200.

<sup>93</sup> Cassirer (2000), p. 102.

<sup>94</sup> Cassirer (1944), p. 57 and (1957), p. 1.



problem of representation (and, thus, perception, conception, and expression) is itself ‘the central problem of knowledge’.<sup>95</sup>

According to Cassirer, there is a clear zone of indistinction, or intersection, between pure immediacy and epistemological thought. This zone is represented by the *symbol*, that is, by the instrument with which we mediate reality and make a synthesis of it (‘all cultural activities . . . fulfil one and the same task: the task of objectification’.<sup>96</sup> The symbol thus mediates between reality and subjectivity because, instead of having independent ‘existence as part of the physical world[,] it has “meaning”’.<sup>97</sup> This is why, in the history of humankind, the symbol has assumed different *forms*: myth, language, religion, art, history, and science. In this sense, what matters for our purposes here is that: 1) as the structure of perceptive knowledge demonstrates, the symbol operates even in the first and entirely non-scientific category of apprehension and self-consciousness, that of the myth (which is why Cassirer could argue that the ‘relations which [myth] postulates are not logical relations’ and at the same time speak of ‘mythical thinking’); 2) while myth, language, religion, history, and art are influenced by human experience, the essence of all perceptive-organisational form(s) of representation has been nullified by scientific-rational thought. More precisely, the *modality* through which sense-experience produces self-consciousness has become entirely systematic, and turned out to be knowledge once a totalising *intellectual symbol* (science) entered the scene. Moved by the ‘arrogance’ of providing reality with an organising and indifferent unity, this new ‘form of objectification’ ‘has no actual existence as a part of the physical world; it has a “meaning”’.<sup>98</sup> Moved by the ‘arrogance’ of providing reality with an organising and indifferent unity of phenomenological understanding, science is a ‘stage of theoretical knowledge [that] creates a new form of objectification’.<sup>99</sup> Thus, to Cassirer, ‘[t]o “know” is to advance from the immediacy of sensation and perception to the purely cogitated and mediated “cause,” to dissect the simple matter of sensory impressions into strata of “grounds” and “consequences”’.<sup>100</sup>

Agamben too discussed the dichotomy between knowledge and experience, clarifying that while science (whose subject ‘is the *noūs* . . . which is separate from experience, “impassive” and “divine”’<sup>101</sup>) is aimed at achieving verifiable knowledge, experience (whose subject is ‘common sense, something existing in every individual’) ‘is incompatible with certainty [because] once an experience has become measurable and certain, it immediately loses its authority’.<sup>102</sup> To understand this fully, we must first internalise that ‘for Antiquity the central problem of knowledge is not the relationship between a subject and an object, but the relationship between the one and the many’. This is so because

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<sup>95</sup> Cassirer (1996), p. 193.

<sup>96</sup> Cassirer (1946), p. 45.

<sup>97</sup> Cassirer (1944), p. 57.

<sup>98</sup> Cassirer (1996), p. 217; Cassirer (1944), p. 57.

<sup>99</sup> Cassirer (1996), p. 217.

<sup>100</sup> Cassirer (1955), p. 73.

<sup>101</sup> Agamben (2007), p. 18.

<sup>102</sup> Ibid. p. 20. Cassirer also writes that ‘[i]n the objective content of science individual features are forgotten and effaced, for one of the principal aims of scientific thought is the elimination of all personal and anthropomorphic elements. See Cassirer (1944), pp. 1–22, 207–21, and 228.

‘what is posed for us as the question of experience arose in Antiquity as the question of the relation . . . between the separate intellect and particular individuals, between the one and the many, between the intelligible and the sensory, between the human and the divine’. This is why, Agamben notes, by remaining ‘faithful to the separation of experience and science, human knowledge and divine knowledge’, ‘[t]raditional experience . . . is in fact the experience of the boundary between these two spheres[, namely] death’.<sup>103</sup>

The distinction between intellectual knowledge and praxis constitutes the pillar of Agamben’s inquiry into the illusion that characterises the Western notion civilisation.<sup>104</sup> What is worth noticing for the scope of this contribution is that, through a distortive anthropological shift, modern science has abolished the distinction between knowledge and experience by making the latter ‘the locus—the “method”; that is, the pathway—of knowledge’.<sup>105</sup> Cassirer offered a similar historical reconstruction; in explaining why the ‘modern theory of man lost its intellectual centre [through] a complete anarchy of thought’, he maintained that in modern times ‘the quest is . . . for a general theory of man based on empirical observations and on general logical principles [through] the [scientific] removal of all the artificial barriers that had hitherto separated the human world from the rest of the nature’.<sup>106</sup> Unfortunately, for scientific behaviour to absorb the boundlessness, unpredictability, and fallibility of any *act* of experience, its promoters had to ‘recast experience and rethink intelligence, first of all expropriating their different subjects and replacing them with a single new subject . . . which is none other than their conjunction at an abstract Archimedean point: the Cartesian *cogito*, consciousness’.<sup>107</sup>

In this sense, the total penetration of this mechanical form-of-(non-)living into the deliberative and fallible formation and performance of our volitions, and thus into the *active* determination and *experience* of our uniqueness, should lead us to admit that ‘the question of experience can be approached nowadays only with an acknowledgement that it is no longer accessible to us’. This is so because of the role assumed by the ‘experiment’, which is the enactment of the ‘scientific verification of experience . . . permitting sensory impression to be deduced with the exactitude of quantitative determinations and, therefore, the prediction of future impressions’. This anthropological shift, Agamben further maintains, has displaced experience ‘as far as possible outside the individual: on to instruments and numbers’.<sup>108</sup>

Cassirer had assigned to the scientific experiment the same anthropological role fifty years before Agamben.<sup>109</sup> Later on in his research, he held that ‘[h]uman culture taken as a whole may be described as the process of man’s progressive self-liberation’ from the conflicting oscillation between ‘stabilisation’ and ‘evolution’, ‘objectivity’ and ‘subjectivity’, ‘universality’ and ‘individuality’ that has

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<sup>103</sup> Ibid., p. 121.

<sup>104</sup> Agamben (2011), pp. 122 and 141. Similarly, Marramo (2005); Marramao (2007), Marramao (2013) places the voiding of experience at the centre of modern secularisation.

<sup>105</sup> Agamben (2007), p. 22.

<sup>106</sup> Cassirer (1944), pp. 21 and 13 respectively.

<sup>107</sup> Agamben (2007), p. 21.

<sup>108</sup> Ibid., p. 20.

<sup>109</sup> Cassirer (1955), p. 44.

afflicted humans ever since.<sup>110</sup> By offering us the ‘assurance of a constant world’,<sup>111</sup> and thus perfect harmony through which to control the chaotic movement of what makes us human, science has become the main tool in the quest for this self-liberating order from the ‘reason’ / ‘imagination’ dichotomy.

The re-discovery of the relationship between self-dissolving knowledge and behaviour and self-defining experience and action may therefore shed new light on the paradoxical condition of the *pactum* in the Public and Private law dimensions that lies at the centre of the chapter, and thus, on what unites the fictional nature of nation-state and the roadmap pursued by the promoters of a global model of society underpinned by notions of ‘civilised economy’ and ‘good economic governance.’ If we agree with Cassirer that the alleged objectiveness of reality is always tested by the critical character of our sensory consciousness,<sup>112</sup> we may soon realise that what we (think) we know about these facts is actually very different from the daily experience we have of them.

## **4      *Pactum, Oath, and (Good) Faith***

### **4.1.    *Why Hobbes***

The necessity of saying a few words on the need to re-discover the importance of the distinction between knowledge and experience in Constitutional and Contract law discourse is not only related to the role that the latter has in theoretical inquiry. What is of significance for present purposes is rather that, according to Arendt, it was experience (and in particular, the experience of freedom) that rendered the American Revolution successful, unlike its French counterpart,<sup>113</sup> and that Hobbes himself put this dichotomy at the centre of his reflections on the formation and functioning of body politic,<sup>114</sup> Indeed, it is through the systematic and mechanic conceptualisation of reality that, as Pocock has carefully discussed, Hobbes ‘historicis[ed] faith in a new way, one of the highest relevance to politics’.<sup>115</sup> This was done by ‘declaring God to be non-existent or irrelevant [because] the whole body of our faith is reducible to the construction of a system of authors and of authority, existing through time and resting on the statements they transmit, our opinion of the authority they have as transmitters, and the authority of the previous speakers, back to God himself, whom we accept as author in the act of accepting any one of them’.<sup>116</sup>

This also suggests that the constitution of the Leviathan may be considered as one of Heidegger’s ‘inceptions’ through which, since Plato, Western metaphysical thought has displaced the

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<sup>110</sup> Cassirer (1944), pp. 222–228, at 228; see also Cassirer (2000).

<sup>111</sup> Cassirer (1944), p. 207.

<sup>112</sup> Cassirer (1955), pp. 30–33. Fletcher (1998) Comparative law as a subversive discipline. *AJCL* 49: 683–700

<sup>113</sup> Arendt (2006), pp. 156–170. To Arendt, political action can *only* be such through collective experience. See also Arendt (2005), p. 127.

<sup>114</sup> For two recent accounts, see Galimberti (2016), pp. 442; Wootton (2016), pp. 286–299.

<sup>115</sup> Pocock (1989), p. 165. The ‘knowledge-experience’ antithesis is particularly emphasised in *Behemoth* as well (1990), pp. xvi–xviii.

<sup>116</sup> Pocock (1989), p. 165. See also *ibid.*, pp. 165–66.

self-conscious human subject and thus the radically finite meaning of human existence. It is indeed anything but a coincidence that, while listing the elements of which the *statum civitatis* as common-wealth is made, Hobbes adds the particle ‘good’ before ‘will’.<sup>117</sup> Hobbes’ aim is to captivate human conduct<sup>118</sup> by setting a limit for something that, being irreducible, cannot, per se, be imprisoned. More precisely, believing that man’s sinful nature is what causes death among men, Hobbes captivated human action by setting a limit on its essence and performativity so that it could be transformed into behaviour, that is, into a form of conduct that can be controlled. The constitution of the sovereign demands the nullification of the self-asserting ‘I-will’ and its compliance with what Kant, the philosophical father of capitalist reason and distribution of property rights,<sup>119</sup> will define as the universal ‘categorical imperative’ (‘I-will-and-cannot’, to be discussed below).

Hence Hobbes’ political project falls within the broad purview of foundational constitutionalism, that is the ‘idea of a political and social order not based on history and tradition but shaped by humankind along rational lines’.<sup>120</sup> From this it follows that Hobbes is the key to understanding the ‘form-of-(non-)living’ that underpins our global age. Some commentators may propose that this could be contended for all the political philosophers of the seventeenth century, particularly Locke. However, it was with Hobbes that the modern administrative *officium* of mechanical governance was inaugurated, in which, to use Pocock’s words, ‘the whole content of revealed religion is potentially of concern to the civil magistrate’.<sup>121</sup> By ‘religion’ we should mean the juridico-political *deditio in fidem* that in Greek and Roman times linked the city and the people together.<sup>122</sup> The term ‘concern’ indicates instead the theoretical premise for the practical voiding that the Hobbesian sovereign, as mere civil magistrate, makes of the public-religious bond with the intent to let civil society’s capitalist (and, thus, scientific) interests dissolve the *act* of political government. In this way, through what Legendre has rightly defined as the ‘logic of assembling’, the sociopolitical and economic order are continuously created, destroyed, and re-created for instrumentalist economic purposes as needed.<sup>123</sup> If ‘the established tradition of bourgeois society [is] to consider political institutions exclusively as an instrument for the protection of private property’,<sup>124</sup> it becomes evident why ‘Hobbes . . . is the only great philosopher to whom the bourgeoisie can rightly and exclusively lay claim’.<sup>125</sup> Arendt has noted that the first step in this roadmap was taken when the bourgeois as ‘ruling class in capitalist production . . . turned to politics out of economic necessity’.<sup>126</sup> Our duty is to point out that

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<sup>117</sup> Hobbes (1998), p. 116. See also Hobbes (1990), pp. 42 and 58.

<sup>118</sup> Cf. Holmes, above note 113, p. xi. See also Galimberti (2016), p. 411, and pp. 442–446. *Contra*, see Cavalletti (2005), p.160.

<sup>119</sup> On this point, see Kant’s *Metaphysics of Morals* and Benjamin’s *Capitalism as Religion*.

<sup>120</sup> Krisch (2012), p. 18.

<sup>121</sup> Pocock (1989), p. 166.

<sup>122</sup> In different terms, see Schiavone (2012), pp. 123–125.

<sup>123</sup> Legendre (2009), p. 41. See also Supiot (2007), p. 31.

<sup>124</sup> Arendt (1973), p. 149.

<sup>125</sup> *Ibid.*, p. 139.

<sup>126</sup> *Ibid.*, p. 126.

this is, in truth, a never-ending process because such emancipation can only be protected as long as ‘wealth’ is used as ‘capital’ through reification.<sup>127</sup>

Once we acknowledge this, it becomes clear why the intrusion of the administrative *technē oikonomikē* within the domain of the political has not only caused the erosion of the democratic conception of substantial equality but has also determined the birth of the modern state as a mere bureaucratic administrative apparatus in the Weberian sense. To link Weber’s notion of ‘rational bourgeois economic life’ and Agamben’s above-quoted conviction that ‘the planetary petty bourgeoisie is probably the form in which humanity is moving toward its own destruction’ is thus inevitable. If, indeed, ‘the concept of the state presupposes the concept of the political’,<sup>128</sup> what remains in front of us is nothing but a value-free and post-political *homo animalis* who administers the reason and interest-oriented behavioural interaction of (non-)humans as contracting units.

## 4.2. Why Good Faith?

Civil law jurisdictions have always had a strong approach to good faith. The fact that the Italian 1942 Civil code was the first in Europe to contain a specific provision on pre-contractual good faith is just an example.<sup>129</sup> Others may be Rudolph von Jhering’s and Gabriele Fagella’s 1860 and 1906 accounts of the importance of *culpa in contrahendo* and *bona fides*,<sup>130</sup> or Emilio Betti’s insistence on an integrative approach to good faith according to which each party has the implied duty to take into account the other’s rights and interests.<sup>131</sup>

The Common law courts’ recent interest in contractual faithfulness, however, stands in clear opposition to the self-interested logic that underpins both the bargain theory of consideration at the private level and Hobbes’ project at the public one. This innovative trend should not be taken for granted, as the neoclassical ‘consideration-offer-acceptance’ trinity<sup>132</sup> of the civilising mission of contract has not only played a pivotal role in the development of the Common law tradition to date, but, among other factors, has determined the World Trade Organisation’s preference for Common law systems. To comprehend this fully, our efforts should also focus on why, over the last few years, countless commentators have offered their views on the displacement of traditional politico-juridical categories by inquiring into humankind’s animalisation.

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<sup>127</sup> Arendt (1998), p.139 and pp. 299–300.

<sup>128</sup> Schmitt (2007), p. 19.

<sup>129</sup> Cf. Art. 1337 Civil code.

<sup>130</sup> See, respectively, *Culpa in Contrahendo der Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, in *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, IV.1; *Dei Periodi Precontrattuali e della loro vera ed esatta costruzione scientifica*, in *Studi Giuridici in Onore di Carlo Fadda*, III, 271. In particular, Fagella showed the importance of distinguishing three different periods of good faith (the period before any offer has been drafted; the period during which an offer is drafted; the period when the offer has been made). Cf. Saleilles (1907).

<sup>131</sup> Betti (1953), p. 90.

<sup>132</sup> Hamson (1938), p. 234.

Sociopolitical and legal theorists, as well as philosophers are well aware of the imperativeness of the post-humanist challenge brought about by the global governance model of the *lex mercatoria*. The political use of contractual good faith at the centre of this contribution, I contend, suggests that the solution to this delicate post-humanist issue is (also) coming from the Private law sphere. While describing the ideology of contractualism, mentioned earlier, Supiot has acutely noted that ‘questions that were previously the remit of the State are now referred to the contract and negotiation’.<sup>133</sup> The movement toward the conceptualisation of good faith as an implied term and organising principle, I submit, ought to be inscribed within this phenomenon. More precisely, it is due to the need to counterbalance our inhuman condition.<sup>134</sup>

Once analysed from this perspective of inquiry, it emerges that what we are witnessing through the emphasis on good faith in Contract law theory and practice is the use of Private law’s symbolic normative forms to contrast with the dissolution of the public sphere.

That this contradictory phenomenon cannot be understood without inquiring into the illusionist scheme that led to the creation of the Hobbesian common-*wealth* is proved by the way in which Australian courts have been using the doctrine of good faith over the last two decades. Australia lacks a comprehensive protection of Human Rights and fundamental freedoms at the federal level. This is because its Constitution has neither a Bill of Rights nor strong and effective equal-treatment provisions. As a result, the Australian judge is, so to speak, ‘forced’ to prioritise a contextual rather than formalist approach to ensure respect for fundamental values.<sup>135</sup> As the development of the role of good faith in contracting suggests, Australian courts use the law of contract at times to establish at the private level what the public one cannot provide. This is so notwithstanding the changes in judicial trajectories with respect to the source, content, and extent of a general contractual duty of good faith, which should be inscribed in the understandable need for caution.<sup>136</sup> Similarly, the transplant of the Human Rights and unfair contract terms of supra-national regimes into the UK through the Human Rights Act 1998 and the Unfair Terms in Consumer Contracts Regulations 1999 makes the interpreter wonder why, in the land of *Walford v. Miles* in which good faith has long been considered a ‘legal irritant’,<sup>137</sup> the theoretical

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<sup>133</sup> Supiot (2007), p. 103

<sup>134</sup> Cf. Schiavone (2012), pp. 145–153 and 221–224.

<sup>135</sup> On this point, see George Williams’ scholarship on Human Rights protection.

<sup>136</sup> In *Paciocco v Australia and New Zealand Banking Group Limited*, quoted above, note 22, Allsop CJ described good faith as a ‘normative standard’ and further maintained that ‘it is a good example of the presence of values in the common law’, at paras 290 and 287 respectively. His Honour also described good faith ‘as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content’, at para 287. The lead on this issue was taken in the early 1990s by the New South Wales Court of Appeal, followed by the Victorian Court of Appeal and the Federal Court. The debate about the existence of an implied contractual obligation of good faith tends to be accompanied by that about the effective purview of its content (i.e., reasonableness, fair dealing, etc.) and the existence of fiduciary obligations. Recently, cf. *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (No 6), [2015] FCA 825 (Federal Court of Australia), paras 998–1019.

<sup>137</sup> Teubner (1998), p. 11. To be compared with the more recent developments quoted above, note 22.

accomplishment of the transition ‘from liberties to rights’<sup>138</sup> could not have been obtained independently from within.

The combination of these facts with the pre-juridical, mythical origins of faith and action<sup>139</sup> and the importance that good faith is assuming within the Common law tradition should make us wonder whether we are in fact capable of internalising what the mythical, faithful bond that lies at the core of the *pactum* really entails. At first glance, the answer appears to be that we can comprehend and describe it in light of our existential need to make sense of the phenomena that shape our lives. And indeed, Cassirer was of the opinion that, particularly in the sphere of myth, ‘we sense . . . the feeling that human culture is not something given and self-evident, but rather that it is a kind of miracle that requires explanation’.<sup>140</sup>

Unfortunately, our intellectual enterprise to discern the humanising force that, through action, good faith plays in Contract law can be immediately challenged from the outset by the very supra-logical essence of any faithful act. If there is one clear message to be taken from Kierkegaard’s *Fear and Trembling*, it is that the realm of faith is inaccessible to human discourse and logic. Yet it might be noted that this is, in truth, not even a matter of concern in our post-historical and post-political age—the reason being, as mentioned earlier, that what constitutes human uniqueness is to be found in our power-to-will, that is, in our faculty to decide both ‘for’ and ‘against’ something or someone and then *act-ively* perform our volition in deciding who we are as persons. And if we bear in mind that the law’s regulative function depends on the interference of the jurist over the (actively decisive) unpredictability of what makes us human,<sup>141</sup> it follows that the behavioural modes of human existence and socialisation at the centre of this contribution displace the need for political and juridical subjectivisation and representation.

In other words, if what makes us human is unable to perform itself through the constitutive essence of political action, we no longer have any existential experience of ourselves. This also explains why the shift from ‘input’ to ‘output’ forms of legitimation and accountability in which the experimentalist architecture of inter-connected channels of post-national governance is rooted is one of the main aspects of the current dissolution of what makes us human: in an age in which authority and its foundation have disappeared, there have emerged liquid, soft-networked schemes of post-national governance—that is, value-free mechanisms that transcend state-based patterns of government and regulation—that work according to ‘output’ forms of legitimation and accountability.<sup>142</sup>

For the very same reason, however, the Common law judge’s interest in the faithful, and thus mythical, component of the contractual bond may be interpreted as an attempt to put the self-defining

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<sup>138</sup> Costigan and Thomas (2005), p. 51. But see also du Bois’ contribution to this book, arguing the Human Rights Act has had very little impact thus far on the law of contract.

<sup>139</sup> Agamben (2005); Agamben (2011), pp. 15–29; Agamben (2016), p. 23.

<sup>140</sup> Cassirer (2000), p. 3.

<sup>141</sup> Heidegger (2012), p. 31; Heidegger (2008), pp. 283–84.

<sup>142</sup> Siliquini-Cinelli (2015a).

(i.e., humanising) properties of action back on stage through contracts. Yet it could be argued that by imposing the duty to act in good faith upon the parties to a contract, the Common law judge is in fact reproducing within the Private law dimension Hobbes' behavioural mechanisms of societal interaction, and thus, limiting private autonomy. However sound, this argument would not consider what is required for the mythical component of an *act* of (good) faith to perform its humanising instances and constitute both individual and collective forms of experience.

Mythical thinking, human experience, and action are all related. Cassirer demonstrated this clearly. While explaining that 'myth . . . expresses an original direction of the human spirit, an independent configuration of man's *consciousness*',<sup>143</sup> Cassirer held that 'mythical consciousness . . . "explains" the individual event by postulating individual *acts of the will*'.<sup>144</sup> It is in this sense that we should overlap Hobbes' intention to neutralise human action with Cassirer's explanation of why mythical consciousness depends 'on man's self-limitation in his immediate relation to reality, as a *willing and acting subject*'.<sup>145</sup>

The same applies to the mythical essence of (good) faith. As set out by Agamben, '*fides* is . . . a verbal *act*, as a rule accompanied by an oath, with which one abandons oneself completely to the "trust" of someone and obtains, in exchange, that one's protection. The object of the *fides* is, in every case, as in the oath, conformity between the parties' words and actions.'<sup>146</sup> From this passage it emerges that in an age such as ours, in which financial and free-market-capitalist praxis feed on depoliticisation and dejuridification by making (non-)humans mechanically behave rather than spontaneously act, the mythical and sacred (p)*act* of (good) faith that should hold humankind together at the public level becomes irrelevant. That is why, at the time of writing, politics has 'assume[d] the form of an *oikonomia*, that is, of a governance of empty speech over bare life'.<sup>147</sup> Conversely, the performative essence of the faithful bond that characterises the contract within the Private law dimension leads to the rediscovery of action and language through the deactivation of *homo oeconomicus*' behavioural schemes of interaction.

That said, the last element that we need in order to understand fully what is happening to the (p)*act* of *deditio in fidem* on the public and private scales in the West is Kant's categorical imperative to 'act according to that maxim whose universality as law you can at the same time will'.<sup>148</sup> The reason for addressing Kant's maxim is threefold: first, because of Agamben's argument on the dehumanising function played by modern Human Rights charters; second, because, as pointed out earlier, the formation of Hobbes' dehumanising common-*wealth* required the nullification of the self-asserting 'I-will' and its compliance with Kant's categorical 'I-will-and-cannot'; finally, because while Kant

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<sup>143</sup> Cassirer (1955), p. 3

<sup>144</sup> Ibid., p. 48. (Emphasis added).

<sup>145</sup> Ibid., p. 85. (Emphasis added).

<sup>146</sup> Agamben (2011), p. 27. (Emphasis added).

<sup>147</sup> Ibid., p. 72.

<sup>148</sup> Kant (1997), p. 54.



conceived of the categorical imperative as a way to protect capital interests and property rights, legal scholars have, perhaps unconsciously, obscured his dehumanising and post-political approach to life by transplanting it into Human Rights discourse.

By way of example, Besson described Human Rights as ‘a sub-set of universal moral rights (i) that protect fundamental and general interests (ii) against the intervention, or in some cases non-intervention, of (national, regional or international) public institutions (iii)’.<sup>149</sup> Later on, Besson enlarged the extent of the relationship between morality and law and, building on Raz, claimed that legal rights ‘are moral interests recognised by the law as sufficiently important to generate moral duties’.<sup>150</sup> Legal Human Rights serve the same function, as they ‘are fundamental and general moral interests recognised by the law as sufficiently important to generate moral duties’. Yet these two categories are autonomous: ‘moral rights can exist independently from legal rights’ and some legal rights ‘may not actually protect pre-existing moral rights or create moral rights’. In this case, they are ‘legal duties at the most’.<sup>151</sup> Besson’s taxonomical approach is, however, merely notional because ‘respect for universal moral [i.e., not just human] rights *ought to be voluntary* in priority . . . independently from any institutional involvement’.<sup>152</sup>

While Besson’s use of the term ‘voluntary’ seems to suggest that what is at stake here is the subject’s self-defining (i.e., active) comportment, the Kantian (i.e., behavioural) principle that informs her normative rationalism is evident. Notably, Kant promoted an idea of moral conduct that ‘tells the agent to subordinate the will to the universal perspective of reason itself’.<sup>153</sup> As acutely noted by Arendt, not only is morality excluded from Kant’s precept<sup>154</sup> (as it is in Besson’s narrow notion of ‘legal duties’), but Kant’s strategy targets what constitutes our uniqueness: the humanising conflict that takes place within the will between *velle* and *nolle*.<sup>155</sup> Hence Kant used his categorical imperative to dream of a contractarian, totalising, perpetual common-*wealth* of peace and contemplation in which economic security is provided by the fact that ‘[t]he subject is now to give to himself the principle of his own being: reason’.<sup>156</sup> Yet, as Arendt taught us, the ultimate basis of human (civil) rights is political action, and political action cannot be built on contemplation. This is why the regulative belief that underpins Kantian ethics has turned out to be one of the main components of the notions of ‘civilised economy’, ‘good economic governance’, and, through them, our behavioural animalisation. The post-historical and post-political essence of both the civilising mission of contract and modern constitutional project are indeed in line with neo-Kantian forms of social analysis, such as that of von Kempfski, according to

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<sup>149</sup> Besson (2013), p. 341.

<sup>150</sup> Ibid., p. 345.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid., p. 346. (Emphasis added).

<sup>153</sup> Kahn (2012), p. 127.

<sup>154</sup> Arendt (2003), pp. 68 and 70–72.

<sup>155</sup> Arendt (1978), p. 63.

<sup>156</sup> Kahn (2010), p. 59.

whom all social sciences, including jurisprudence, can be explained through the dehumanised behavioural schemes offered by mathematical economics.

This is also demonstrated by the way in which the Kantian metaphysical principle that defines what is ‘right’ is structurally related to a peculiar universalist conception of one of (contract) law’s key elements, that of ‘legal duty’, which also figures in Besson’s reflections. Building on Schopenhauer and Heidegger, Agamben has shown, I think successfully, that ‘Kant represents the moment when the [Western] ontology of command and having-to-be reaches its most extreme elaboration and, by penetrating into the ontology of substance and being, seeks to transform it from within’.<sup>157</sup> This is so because, in describing ‘the nature of the command and duty stemming from the law in terms of an external constraint[, Kant] transfers this definition to morality in the form of autoconstraint (*Selbstzwang*)’.<sup>158</sup> Thus Kant developed an ‘ontology of operativity’ in which ‘being and acting are indeterminated and contracted onto one another, and being becomes something that does not simply *exist*, but *has to be* brought about’.<sup>159</sup> Agamben concedes that ‘the command . . . presupposes a will’.<sup>160</sup> However, from the perspective of the ruled, the humanising properties of action are replaced by Kant’s practical reason.<sup>161</sup> The paradox of Kantian autoconstraint is thus clear: it is ‘an objective command which assumes the form of a subjective impulse (*Triebfeder*)’.<sup>162</sup>

## 5 Conclusion

We can now attempt to overlap the Kantian ontology of duty with the self-defining component of the legal ideology of contract discussed earlier that, by placing the parties on a moral-political, and thus equally humanising, platform of interaction, tries to counter the modern constitutional ideal as well as the global paradigms of ‘civilised economy’ and ‘good economic governance.’

As the influence of constitutional values and Fundamental Rights policies on Contract law’s mechanisms and settings that this book has addressed indicates, the contract is gradually becoming the ‘political community of equals’<sup>163</sup> to which Besson refers when explaining how the law makes universal moral rights ‘Human Rights *strictu sensu*’.<sup>164</sup> In light of the foregoing discussion, it seems difficult to

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<sup>157</sup> Agamben (2013), p. 121. See also Agamben (2013); Agamben (2011).

<sup>158</sup> Agamben (2013), p. 114.

<sup>159</sup> Ibid., p. 118.

<sup>160</sup> Ibid., p. 129.

<sup>161</sup> See Caputo (2001), pp. 42–43: what we are standing before here is the “‘thinking thing” fully in charge of its potencies and possibilities, surveying the contents of its mind to sort out which among them represents something *objective* out there in the external world and which should be written off as merely internal and *subjective*” (emphases added). Cf. Arendt (1978), p. 86.

<sup>162</sup> Agamben (2013), p. 114.

<sup>163</sup> The inequality of bargaining power and the fact that commercial interests do not necessarily need to be sacrificed on the altar of good faith are of course different issues from those discussed here. As Consumer law and unconscionable conduct regimes, broadly understood, make clear, what is relevant in the courtroom is the modality through which this power is exercised and the reasons why it is exercised that way.

<sup>164</sup> Besson (2013), p. 346.

dispute that the intensification in the use of contractual good faith is a pivotal component of this phenomenon, and, in particular, of the constitutionalisation of Contract law.

Some commentators would probably deem this suggestion to be misleading and/or mystifying. In particular, they might point to the illusory essence of consensualism because '[a]lthough contract purports to replace or supplement the obligations of public law with "private law", every such attempt is subject to judicial review'.<sup>165</sup> The same might be said regarding the *ex-post* requirements with which the parties may be required to comply to secure, say, the passage of property rights. Both contentions would certainly be appropriate. However, paraphrasing Heidegger with the due caution,<sup>166</sup> we may say that the 'temporal determinateness'<sup>167</sup> of the *contr-act* is expressed by the parties' 'anticipatory resoluteness'.<sup>168</sup> Consequently, what happens after the parties finalise the agreement through action and deed does not alter the fact that, while at the public level the Kantian imperative has a self-dissolving, captivating effect,<sup>169</sup> the performative essence of the parties' faithful relationship transforms the contract into a political space of appearance for each of them. In other words, the *contr-act* 'deactivates the very excess of signification' of the Kantian subjectless categorical imperative. If the 'only foundation of man is . . . his own action, his own giving himself grounds',<sup>170</sup> the *p-act-um* becomes a 'mark of factual experience', that is, the uncovering signature of the parties' self-conscious projection and *re-flexion*.

To comprehend the legal dimension of this process fully, we should bear in mind why Agamben is also of the opinion that Kant's ontology of operativity and command found its greatest expression in

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<sup>165</sup> Joo (2013), p. 64.

<sup>166</sup> The use of Heidegger at this stage of our inquiry requires prudence because of his commitment to fighting the metaphysical tradition of subjectivity which, as set out in *Besinnung*, he believed culminated in the 'modern historical animal'. Yet in *The Fundamental Concepts of Metaphysics*, Heidegger clearly distinguished between human comportment as acting and doing, and animal behaviour as a disinhibited, captivated form of conduct, which confirms the appropriateness of his scholarship for the purposes of our discussion. Attention should also be paid to Heidegger's peculiar use of the 'will' in the lectures on Nietzsche that he gave between 1936 and 1940, that is, in the years of his much-discussed 'reversal'. I particularly refer to the first and second Volumes of *Nietzsche*, in which Heidegger's decisionism is prominent, as it is in his lectures and writings of the 1940s such as *Basic Concepts*. More specifically, to Heidegger, decision (*Entscheidung*) is the fundamental act of self-appropriation (*Selbstbehauptung*). Thinking, which becomes the central topic of Heidegger's later works, is the most powerful expression of this event (*Ereignis*) as he himself describes it. Finally, the role that Heidegger gives to the 'decisive essence of willing' towards our 'open resoluteness' in his *Introduction to Metaphysics*, published in 1953, is in line with that which he expounded in *Being and Time*, published in 1927. His admiration for Paul, the founder of the faculty of the will, is therefore less surprising than it might first appear.

<sup>167</sup> Heidegger (2008), pp. 163, 175, 232 and 238–39. See also *ibid.* pp. 40, 237, 386, and 470. Agamben has recently contended that '[t]o the primacy [that Heidegger confers on] care over use corresponds, in the second division of [Being and Time], the primacy of temporality over spatiality'. If that is the case, it would prove worthwhile to ascertain whether the contractual notion of good faith shares some elements—and if so, which ones, why, and to what extent—with Heidegger's conception of care as 'the fundamental structure of Dasein'. See Agamben (2016), pp. 43 and 38 respectively.

<sup>168</sup> Heidegger (2008), pp. 372, 236, and 386.

<sup>169</sup> 'Kant's blindness', Agamben writes, 'is not to have seen that, in the society that was arising with the industrial revolution, in which human beings had been subjected to forces that they could not in any way control, the morality of duty would habituate them to consider obedience to a command . . . an act of freedom'. See Agamben (2013), p. 123.

<sup>170</sup> Agamben (1999a), p. 135.

Kelsen's pure theory of (Public) law and notion of sovereignty—that is, in the positivistic conception that sees '[t]he relationship between norm and behaviour . . . not [as] a relation of being but a relation of having-to-be'.<sup>171</sup> The term 'behaviour', I contend, is obviously not casual, because what takes place in Kelsen's juridification of the Kantian regulative paradigm is the displacement of the subject's free 'action' as informed by the internal conflict from which the sovereign choice between *velle* and *nolle* arises. What is neglected by Kelsen is thus the sovereignty of the will to perform the self-understanding of humans' uniqueness through the affirmation or negation of a future project, as it is in Hobbes.<sup>172</sup> This is why Caputo writes that 'Kant is the Chief of Police' who 'always tell[s] us what is possible and what is not [by] laying down the conditions of the possibility of this or that'.<sup>173</sup> That Kantian philosophy is ahistorical and apolitical<sup>174</sup> is thus proved by the fact that this sort of coercion does not require the personality of those who are subject to it.<sup>175</sup> Consequently, while Kelsen's Kantian-oriented 'legal ought' is the expression of a 'depsychologized will'<sup>176</sup> similar to that which Hobbes places at the centre of his post-political construct, the emphasis on contractual good faith that has recently emerged in Common law countries replaces the self-defining properties of action back on stage.

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<sup>171</sup> Agamben (2013), p. 124. Agamben clarifies that even though Kant 'believed himself to have secured . . . the possibility of metaphysics and to have founded, at the same time, an ethics that was neither juridical nor religious[, his] ontology is in truth an ontology of command [in which] the guarantee of the effectiveness of duty is . . . the law'. See Agamben (2013), pp. 122, 123, and 112 respectively. See also Agamben (2004), pp. 49–92.

<sup>172</sup> Agamben's quotation of Arendt's evaluation of Kant's influence over Eichmann's behaviour is fundamental. See Agamben (2013), p. 123. Cf. also Heidegger (1995), pp. 232 and 240, where human comportment is defined as 'acting and doing', and animal behaviour as 'being driven forward' by stimuli that captivate the subject's existence.

<sup>173</sup> Caputo (2001), p. 49.

<sup>174</sup> Cf. Kymlicka (2002), p. 209; Arendt (2003), pp. 70–72.

<sup>175</sup> Bernd (2015).

<sup>176</sup> Kelsen (1957), p. 215.

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